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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
Petitioner

v.

STATE OF ARIZONA, AND PAUL WADDELL,
Director of the Arizona Department of Revenue,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the State of Arizona may impose its full 5% sales tax on shopping center transactions on the petitioner Tribe's trust reservation land where

(a) The Tribe's only revenue from the development is from tribal taxes and such revenue is required for urgent community needs and to achieve economic self-sufficiency;

(b) The Tribe's revenue from the development is diminished, dollar for dollar, by the State tax;

(c) The division of available tax revenues between the State and the Tribe is effectively controlled by the State and, under the State-controlled system, the Tribe is allowed only about 19% of the total taxes imposed; and

(d) No State tax revenue is expended for governmental services to the Tribal community and all governmental services for the development are furnished by the Tribe.

II.

Whether the State may burden a tribal economy by taxing reservation enterprises for the benefit of its cities and counties.

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SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
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v.

STATE OF ARIZONA, AND PAUL WADDELL,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Salt River Pima-Maricopa Indian Community, petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision upholding the respondents' taxation of enterprises on the petitioner's reservation.

OPINIONS BELOW

The opinion of the Court of Appeals, filed on March 21, 1995, is reported at 50 F.3rd 734 and is reprinted in the Appendix at pages 1a -11a. The petitioner's petition to the Court of Appeals

for rehearing was denied by order filed on April 27, 1995. App. 12a. The unpublished Memorandum of Decision and Order and the Judgment of the United States District Court, District of Arizona, were filed on September 3, 1993, App. 13a - 21a and 22a.

STATEMENT OF JURISDICTION

This petition is filed within 90 days of the order of the Court of Appeals denying the petition for rehearing. The jurisdiction of this Court is based upon 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

The applicable Constitutional provision is the Commerce Clause, Art. I, §8, cl. 3:

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Arizona transaction privilege tax, Chapter 8 of Title 42, Arizona Revised Statutes. The specific provisions, reprinted in the Appendix at App. 23a - 25a, are: A.R.S. §42-1306 which describes the tax and states its purposes; §§42-1310.01A, 42-1310.13A and 42-1310.14 which create classifications for retail, amusement and restaurant businesses respectively; and §42-1317A1(j), (k) and (m) which impose a 5% tax on retail, amusement and restaurant businesses and §42-1317C and 42-1341 which provide for distribution of 0.5% and 0.81% to cities and counties, respectively.

The sales tax provisions of the petitioner's Code of Ordinances at App. 26a - 28a.

STATEMENT OF THE CASE

This case deals with the imposition of the State's 5% sales tax on reservation enterprises to raise general revenues for the State, its cities and its counties. The effect of the tax is to burden directly and substantially federal policies and tribal efforts for the achievement of economic self-sufficiency. The Ninth Circuit upheld the tax without any consideration of federal and tribal interests by applying the categorical "smoke shop" rule of *Washington v. Confederated Tribes of the Colville Reservation*, 477 U.S. 134 (1980). The "smoke shop" rule does not apply here because the petitioner, by ordinance and lease provisions, mandates parity of tax rates between reservation and off-reservation enterprises. The Ninth Circuit's action violates the decisional rule of this Court requiring, in cases such as this, that federal and tribal interests be given due consideration as well as the state's general interest in raising tax revenues. *Oklahoma Tax Commission v. Chickasaw Nation*, _____ U.S. _____, 115 S.Ct. 2214 (1995).

Petitioner, a federally recognized Indian tribe, occupies and governs a reservation on the edge of the greater Phoenix area in central Arizona. It lies immediately east of the city of Scottsdale which has a substantial resort industry. Petitioner's community is, by comparison with the surrounding urban population, sparsely populated and has pressing economic needs.

The cardinal purpose of federal Indian policy is to ameliorate difficult economic and social conditions on reservations. Particularly during an era of declining federal revenues, acts of Congress, enacted under the authority of the Indian Commerce clause, encourage economic development and greater tribal self-sufficiency. The petitioner has responded to the federal policy by determined efforts to develop a sound tribal economy which, like those of states, must rest on a viable tax base. This policy

is the basis of decisional rules of this Court that apply to this controversy.

Within the context of these federal and tribal policies, the petitioner accomplished the development of a large modern shopping center that is conveniently accessible to the neighboring off-reservation communities. The development is sited entirely on reservation lands allotted to individual Indians. The allotted lands are held by private enterprises pursuant to leases which are comprehensively regulated under acts of Congress and Interior Department regulations. All rents are paid to the allotted landowners. The development's contribution to the petitioner's economic development is entirely in the form of tribal taxes, including most particularly, sales taxes on gross revenues from the retail sale of goods and services.

The petitioner's sales tax ordinance requires that the tax on reservation sales be at the same rate as is applicable in neighboring Scottsdale. App. 26a. Commercial development on the reservation would not be possible if taxes there were higher than taxes off reservation. On the other hand, the petitioner has a strict policy against operating a tax haven at the shopping center. As a result, taxes have no bearing upon a person's decision to patronize a reservation enterprise. The issue here is how a finite tax should be divided between the State and the petitioner.

The State's 5% tax, plus 0.7% special use taxes which are collected by the State and not questioned by the petitioner, effectively limit the petitioner's tax to the 1.4% rate which is imposed by Scottsdale.

The State does not furnish any governmental services to the reservation enterprises or to the reservation community.[1] The petitioner furnishes all governmental services to the taxed enterprises which, due to the size of the center, are considerable. The petitioner's reservation, with deep and urgent public needs, serves as a cash register for the State and its subdivisions.

The District Court granted summary judgment to the State on September 3, 1993. App. 22a. In its Memorandum of Decision and Order, App. 13a - 21a, it relied upon the *Colville* "smoke shop" rule in holding that the state tax is categorically applicable to the entire gross proceeds of reservation sales of goods and services. It relied upon an ancillary ruling in *Chemehuevi Indian Tribe v. California Board of Equalization*, 800 F.2d 1446 (9th Cir. 1986), *cert. denied*, 481 U.S. 1051 (1987), in holding that the State is categorically allowed to tax reservation activities to raise funds for its cities and counties.

The Ninth Circuit Court of Appeals affirmed the District Court's decision in an opinion filed on March 21, 1995. App. 1a - 11a. It too relied upon *Colville*, reasoning that the tax-evasion purposes of Indian "smoke shops" was not consequential to the result in that case. The opinion does not mention the petitioner's Indian Commerce challenge to the State's taxation of reservation activities for the exclusive benefit of its cities and towns.

The Court of Appeals denied the petitioner's motion for rehearing by an order filed on April 27, 1995. App. 12a.

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[1]Excluded from consideration here is the State's contributions to highways. In addition to the 5% sales tax, the State collects a 0.5% tax pursuant to A.R.S. §42-1482, and a motor vehicle fuel tax of $0.18 per gallon pursuant to A.R.S. §28-1501, which funds are dedicated to the costs of highway construction and maintenance. The petitioner does not challenge these taxes.

REASONS FOR GRANTING WRIT

I. APPLICATION OF THE CATEGORICAL "SMOKE SHOP" RULE TO ALL RESERVATION RETAIL SALES DISREGARDS SUBSTANTIAL FEDERAL AND TRIBAL INTERESTS IN DISREGARD OF THIS COURT'S DECISIONAL RULES.

The Ninth Circuit's opinion does not speak expressly in categorical terms. Indeed, it quotes a phrase from *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) that calls for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake. . . ." App. 5a - 6a. But then it proceeds to a consideration of the *Colville* "smoke shop" rule and, in effect, holds that it categorically applies to any reservation enterprise that sells "non-Indian" products to non-Indians. App. 6a. The Ninth Circuit would thus recognize exemptions from state tax only for an impractically narrow range of products, such as sales of native arts and crafts, and for sales to tribal members. This pays no regard whatever to the federal and tribal interests in economic development.

The Ninth Circuit's categorical rule necessarily dampens federal and tribal interests where, as here, the tribal benefits from the development are solely from taxes and the amount of the taxes available to the tribe is controlled by the State. In this case the state system allows the tribe a maximum of about 19% of the total taxes that can be charged. The State could as easily take 100% of the taxes by prohibiting local sales taxes and distributing a larger share to cities and counties.

Under the decisions of this Court the application of the categorical rule permitting state taxation is not general but exceptional. Certainly a state's cigarette tax is categorically enforceable because: "[w]hat the smoke shops offer these customers,

and what is not available elsewhere, is solely an exemption from state taxation." And "[w]e do not believe the principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Colville*, 447 U.S. at page 155.

The rule of reason, on the other hand, is represented by *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). In that case the state established that its tax was compatible with tribal interests in that it did not impose an undue burden on the tribe. 490 U.S. at 185.

The significant holding of the Ninth Circuit that the categorical "smoke shop" rule applies to practically all retail operations on Indian reservations disregards the significant federal interest in Indian self-determination and it violates rules of decisions pronounced by this Court.

II. THE NINTH CIRCUIT FAILED TO WEIGH COMPETING FEDERAL, TRIBAL AND STATE INTERESTS WITH RESPECT TO THE 1.31% TAX WHICH THE STATE COLLECTS FOR ITS CITIES AND COUNTIES.

One of the stated purposes of the Arizona sales tax is to raise money for the benefit of Arizona's cities and counties. A.R.S. §42-1306A, App. 23a. To achieve this purpose, the State distributes to cities 0.5%, and to counties 0.81%, of the 5% tax. A.R.S. §§42-1317C and 42-1341C, App. 25a. The State makes no distribution of any kind to Indian tribes. Cities and counties do not furnish any services to the petitioner. There is patently no rational basis for this tax.

The Ninth Circuit did not confront this issue. It merely made

reference to its earlier holding that a state may distribute part of its cigarette excise tax revenue to some local governments. *Chemehuevi Indian Tribe v. California Board of Equalization*, 800 F.2d 1446, 1450 (9th Cir. 1986), *cert. denied*, 481 U.S. 1051 (1987), App. 7a. But the Court shied away from any consideration of the impact of the tax on federal and tribal interests or, indeed, whether there is any rational basis for the tax.

A state's exercise of its taxing power to transfer funds from a tribal economy to its local governments raises a significant question of federal Indian law. The petitioner has not really had a day in court on this issue.

CONCLUSION

For the reasons stated in this petition, a writ of certiorari should be granted.

Respectfully submitted,

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July 26, 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16853
D.C. No. CV-92-00121-SMM
OPINION

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
Plaintiff-Appellant,

v.

STATE OF ARIZONA, AND PAUL WADDELL,
Director of the Arizona Department of Revenue,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted
February 15, 1996 – San Francisco, California

Filed March 21, 1995

Before: Betty B. Fletcher, Harry Pregerson,
and Pamela Ann Rymer, Circuit Judges

Opinion by Judge Fletcher

OPINION

FLETCHER, Circuit Judge:

Plaintiff Salt River Pima-Maricopa Indian Community ("Community") appeals from a summary judgment for the defendants, the State of Arizona and the Director of the Arizona Department of Revenue, Paul Waddell ("Arizona" or "State"). The Community argues that the district court erred by holding that the State may collect taxes on sales and rental transactions on the Indian reservation with non-Indians. We affirm.

FACTS & PRIOR PROCEEDINGS

This case concerns the collection of taxes by Arizona on sales and rentals by non-Indian businesses selling products and services to non-Indians on the Community's reservation. The Community consists of the confederated Pima and Maricopa Tribes of Indians and enjoys official status as a tribe under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*

A shopping mall, known as the Scottsdale Pavilions, is located on land within the Community's reservation. The land is held in trust by the United States for individual allottees and is leased under two separate lease agreements to a non-Indian land developer, Vestar Development Company. The leases were subject to approval by the Secretary of the Interior. The leases provide that the possession of the land will revert and the buildings and improvements will become the property of the allottees at the end of the lease term of fifty-five years.[1] The leases also provide that any taxes levied by the Community in combination with other applicable taxes will not exceed the total sales taxes in the nearby city of Scottsdale. The allottees receive

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[1]The leases allow the lease term to be extended an additional ten years at the option of the lessee.

rents from the developer. The Community acts as the allottees' agent for the payment of rent.

The developer sublet the property to various non-Indian businesses, including Circuit City, Clothestime, Cost Plus Imports, Denny's, J.C. Penney, McDonald's, Taco Bell, Kentucky Fried Chicken, and Home Depot. More than 99 percent of the goods sold at these businesses are owned and managed by non-Indian entities, none of which are residents of the reservation.

Although the Community does not share in the mall's profits or rents, it can and has exercised its right to tax. The Community collects a 1 percent sales tax on gross receipts from sales at the mall. Because of the huge financial success of the mall, the Community's 1 percent tax has resulted in substantial revenues. The gross receipts for 1992 exceeded $100 million and 1993 projections estimated gross receipts of $200 million. Thus, even a 1 percent share of these revenues has resulted in millions in tax revenues for the Community.

The State also collects sales and rental taxes from the subtenants. Sales tax is 5.5 percent on purchases by non-Indians; the tax on rent is 4.5 percent.[2] The State remits .5 percent of its sales tax revenues to Arizona cities and .7616 percent to Arizona counties. The State remits .6 percent of the taxes on gross rents revenues to Arizona Cities and .9139 percent to Arizona counties. The Community does not share in these revenue allocations.

The developer, the State, and the Community all provide services to the mall. The Community provides police protection for the mall. Fire protection is provided by both the Community and the City of Scottsdale, which charges a fee to the businesses that is equivalent to its tax for the service. The Com-

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[2]Sales to members of the Community are not subject to the sales tax. *See* 4 U.S.C. § 109.

munity also conducts health and safety inspections and enforces zoning regulations. The State maintains Pima Road, which lies on the reservation and provides access to the mall. The State is constructing a new highway bordering the reservation, which will include an access ramp to the mall. Electricity is purchased from a state-run utility project. Vestar provides water and sewage. It is undisputed that Arizona and its subordinate entities provide the governmental services used by the non-Indian purchasers off the reservation.

The Community sued in federal court, arguing that the state taxes interfere with its right to impose taxes. In effect, the Community argued that because it acts like a state in providing various governmental services to the mall's businesses, Arizona's 5.5 percent tax should be preempted. The Community also argued to the district court that because the allocation of the tax revenues were discriminatory, the tax was unlawful.[3]

Both the defendants and the Community moved for summary judgment. The district court granted the defendants' motion and entered judgment for the defendants. This appeal followed.

JURISDICTION

The district court's jurisdiction is based on 28 U.S.C. §§ 1331, 1362. "The barrier posed by 28 U.S.C. § 1341 to suits in federal court challenging the assessment, levy or collection of State taxes does not apply to actions commenced by an Indian tribe." *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992) (citing *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470-75 (1976); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989), *cert. denied*, 494

[3]The Community has abandoned its claim of discriminatory allocation of tax revenues on appeal.

U.S. 1055 (1990)). This court has appellate jurisdiction under 28 U.S.C. § 1291.

STANDARDS OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Jones v. Union Pac. RR.*, 968 F.2d 937, 940 (9th Cir. 1992). We will affirm the district court's grant of summary judgment if, viewing the facts in the light most favorable to the nonmoving party, there are no issues of material fact and summary judgment is appropriate as a matter of law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

DISCUSSION

We must decide whether state taxes on the sale of non-Indian[4] goods to a non-Indian by a non-Indian business on a reservation is preempted when the tribe concurrently taxes and provides some of the governmental services used by the non-Indian businesses. Because the Community's activities did not contribute to the value of the goods sold, and because Arizona provides most of the governmental services used by the non-Indian taxpayers, we affirm.

I. Preemption

To determine whether the State tax on reservation transactions is preempted, the court must make "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal

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[4]The term "non-Indian" denotes both Indians who are not members of the Pima-Maricopa Community and persons who are not Native American Indians. *Colville*, 447 U.S. at 160-61 (putting Indians on a foreign reservation on same footing as non-Native Americans generally).

law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). The Supreme Court has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: "the degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax." Felix S. Cohen, *Handbook on American Indian Law* 413 (1982) (citing *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 163-66 (1980); *White Mountain*, 448 U.S. at 141-45; *Colville*, 447 U.S. at 160-63). "This makes Indian law preemption broader than traditional preemption: That is, in the Indian law context, state law is preempted not only by an explicit congressional statement – the traditional preemption standard – but also if the balance of federal, state and tribal interest tips in favor of preemption." *In re Blue Lake Forest Prods. Inc.*, 30 F.3d 1138, 1142 (9th Cir. 1994) (citing *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1407-08 (9th Cir. 1992)), *cert. denied*, 115 S. Ct. 670 (1994).

II. The "Smoke Shop" Cases

[1] When state taxes are imposed on the sale of non-Indian products to non-Indians, as is the case here and in the so-called "smoke shop" cases, the preemption balance tips toward state interests.

In *Washington v. Confederate Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Supreme Court addressed the issue of whether the state's tax on the sale of cigarettes to non-Indians was preempted when the tribe also sought to tax the same sales.[5] *See also Moe v. Salish & Kootenai Tribes*, 425

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[5]Because *Colville* is a preemption case, the Community's claim that the district court failed to undertake a preemption analysis because it relied on *Colville* is clearly without basis.

U.S. 463 (1976) (holding that state may impose nondiscriminatory tax on non-Indian customers of Indian retailers doing business on reservation). The Court found that although Congress sought to foster tribal self-government and economic development, it had not gone so far as to preclude state taxation of sales by Indians to nonmembers of the tribe, 447 U.S. at 155.

The Court then found that the state's interest outweighed the tribe's:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The state also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Id. at 156-157. The Court also perceived no conflict between concurrent taxes on non-Indians by the state and the tribe. *Id.* at 158-59. The *Colville* Court concluded that the tax was not preempted because the state's taxes were "reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations." *Id.* at 157.

In *Chemehuevi Indian Tribe v. California State Board of Equalization*, 800 F.2d 1446 (9th Cir. 1986), *cert. denied*, 481 E.S. 1051 (1987), we addressed a "smoke shop" operation like the one in *Colville* and upheld a state cigarette tax on reservation sales to non-Indians. After finding that no federal statute expressly preempted the tax, we found that "the Chemehuevis are not developing and marketing a tribal resource; they are

importing a finished product and reselling it to residents and visitors." *Id.* at 1449 (citation omitted). We also rejected the tribe's claim that the state tax would "deprive it of badly needed income," noting that the Ninth Circuit and the Supreme Court have repeatedly held that "reduction of tribal revenues does not invalidate a state tax." *Id.*

[2] Applying these principles to the facts here, it is clear that the balance tips in favor of Arizona's taxation. Most importantly, the goods and services sold are non-Indian, and the legal incidence of Arizona's taxes falls on non-Indians. *See Colville*, 477 U.S. at 151 (citing *Moe*, 425 U.S. at 482). Furthermore, Arizona and its agents provide the majority of the governmental services used by these taxpayers. Consequently, the State's interest is at its strongest, not its weakest. *Id.* at 157.

[3] We are not persuaded by the Community's claim that it is entitled to a proportional share of the State's receipts. The Supreme Court has rejected the idea that a tax imposed on reservation activities must be proportionate to the services provided to the Indians. In *Cotton Petroleum Corp. v. New Mexico*, the Court observed that,

> Not only would such a proportionality requirement create nightmarish administrative burdens, but it would also be antithetical to the traditional notion that taxation is not premised on a strict *quid pro quo* relationship between the taxpayer and the tax collector.

490 U.S. at 185, n.15 (citing *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-23 (1937); *see also Chemehuevi*, 800 F.2d at 1450 (stating that "the failure of the state to include the Tribe in its revenue sharing program does not invalidate the state tax" under the Indian Commerce Clause). There may be a limit on state taxation where it effectively prevents appropriate taxation by an Indian tribe. However, that is not the case

here; to the extent that the Community has expended its resources on ancillary services at the mall, it appears that it has been more than adequately compensated through the 1 percent sales tax.

The Community attempts to distinguish *Colville* and its progeny by reading these cases extremely narrowly. The Community argues that the "smoke shop" rule applies only to cases in which the tribe is attempting to create a "magnet" effect of drawing customers onto the reservation by offering a lower sales tax rate than the state. However, even if *Colville* could be limited in that manner, which is doubtful given its expansive language, it does not follow that the state tax here should be disallowed. Arizona's ability to tax these sales precludes the Community from creating a tax haven at the mall. *See Colville*, 447 U.S. at 157. If we were to disallow the state tax, there is nothing to prevent the Community from "open[ing] chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas." *Id.* at 155. In addition, *Colville*'s reasoning also depends on whether the products sold are of Indian origin. *Id.* This rationale would apply regardless of whether the Community was, in fact, attempting to lure consumers onto the reservation for tax breaks.

The Community also argues that this case is controlled by *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992). In *Gila River*, we found that a state tax was invalid because the tribe's activities contributed value to the service sold. The Gila River Community maintained an active role in the business enterprise by developing and marketing on-reservation entertainment to the general public. It constructed a lake and a marina, and then, after negotiations, selected a developer to sublet and improve the property; these improvements then became the property of the tribe. Finally,

the Gila River Community shared in the profits of the enterprise, collected rent, and worked closely with the companies producing the entertainment.

[4] *Gila River* is clearly distinguishable from this case. The mall earns its profits simply by importing non-Indian products onto the reservation for resale to non-Indians. The Community contributes relatively little to the value of the products and services sold at the mall; the businesses are managed and owned by non-Indians, and the Community does not participate in business decisions and does not share in the profits. Consequently, *Gila River* is more akin to cases in which state taxes are preempted because an Indian resource or service is being sold, which is not the case here. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (bingo); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (timber); *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 900-02 (9th Cir. 1987), *aff'd*, 484 U.S. 997 (1988) (coal); *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 114 (9th Cir. 1981), *amended*, 665 F.2d 1390 (1982), *cert. denied*, 459 U.S. 916 (1982) (coal); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990) (timber). *But see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (allowing state taxation of oil and gas extraction on reservation because of state's services to and interest in regulating that industry). For these reasons, we find that Gila River is not controlling.

III. Conclusion

[5] In sum, a preemption analysis requires the court to balance federal, state, and tribal interests to determine whether a state tax violates federal law. The federal government has expressed an interest in assisting tribes in their efforts to achieve economic self-sufficiency. However, that interest does not, without more, defeat a state tax on non-Indians. The Community has an interest in raising revenues, but that interest is at its weakest when goods are imported from off-reservation for sale. The State, too, has an interest in raising revenues, and this interest is at its strongest when non-Indians

are taxed, and those taxes are used to provide them with government services. The preemption balance unmistakably tips in favor of the State. We affirm the district court's grant of summary judgment for the defendants.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16853
D.C. No. CV-92-00121-PHX-SMM
ORDER

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
Plaintiff-Appellant,

v.

STATE OF ARIZONA, AND PAUL WADDELL,
Director of the Arizona Department of Revenue,
Defendants-Appellees.

Before: Fletcher, Pregerson, and Rymer,
Circuit Judges

Appellant's petition for rehearing is denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV 92-0121-PHX-SMM
MEMORANDUM OF DECISION
AND ORDER

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
Plaintiff,

v.

THE STATE OF ARIZONA, AND PAUL WADDELL,
Director of the Arizona Department of Revenue,
Defendants.

The Defendants filed a Motion for Summary Judgment and the Plaintiff filed a Cross-Motion for Summary Judgment. The motions have been fully briefed and oral argument was heard.

BACKGROUND

This action was brought by the Plaintiff, the Salt River Pima-Maricopa Indian Community (the "Community"), to enjoin the Defendants, the State of Arizona (the "State") and the Director of the Arizona Department of Revenue, from imposing the State's sales tax and rent tax on non-Indians transacting business within the confines of the Plaintiff's reservation.

The Community is a federally recognized Indian tribe occu-

pying a reservation in central Arizona. The Indian population on the reservation in July 1991 was estimated to be 4,736. The reservation is bordered on the west by the City of Scottsdale, on the south by the City of Tempe and the City of Mesa, on the east [sic] by the Fort McDowell Indian Reservation and the City of Scottsdale. Pima Road forms a portion of the approximate western border of the reservation, and part of Pima Road actually lies on the reservation. The State has a right-of-way, lease, and/or easement for the location of Pima Road on the reservation. The State maintains Pima Road.

The transactions at issue in this lawsuit take place at the Scottsdale Pavilions, a commercial retail development managed by non-Indian entities. The Scottsdale Pavilions is located on the eastern border of the reservation and leased to non-Indian entities under the laws and regulations of the United States. The land is leased by two lease agreements, each of which provides an initial lease of at least 55 years (each lease commenced in 1988). The leases provide that all improvements on the land belong to the lessee or sub-lessee for the term of the leases, but upon termination of the leases, all buildings and improvements on the land become the property of the lessor.

The developer and primary lessee of Scottsdale Pavilions is Vestar Development Company ("Vestar"), a non-Indian entity.

The lessees have sub-leased property at the Scottsdale Pavilions to various non-Indian businesses. Retail tenants (sub-lessees) at the Scottsdale Pavilions include Home Depot, Target, Ross Dress for Less, Cost Plus Imports, Miller's Outpost, United Artists Theater, Circuit City, Michael's, Marshall's, ZCMI II, Phar-Mor, Mervyn's, Sear's Home Life, Clothestime, Kid's Mart, Athletic Express, Famous Footwear, Hi-Health, Discount Tire Co., Service Merchandise, Toys-R-Us, Eyemaster, Linens Plus, and Bookstar. Restaurant tenants include, McDonalds, Denny's, Kentucky Fried Chicken, and Sizzler.

There is also a Unocal gas station on the development.

Most of the retailers in the Scottsdale Pavilions development are chain stores which operate throughout the nation. It is undisputed that at least ninety-nine percent of the products sold are not produced on the reservation. All businesses are managed by non-members of the Community.

The retailers at Scottsdale Pavilions advertise in off-reservation media to attract off-reservation residents. It is undisputed that the vast majority of consumers who purchase goods and services from retailers at the Scottsdale Pavilions are non-Indians.

At the present time, the only way to access the development is by passing through the City of Scottsdale, via Pima Road and/or Indian Bend Road.

Vestar estimates the trade area population to include 198,000 persons within five miles. The accessibility of the Scottsdale Pavilions to persons outside the five mile radius will increase when the Outer Loop Freeway is constructed by the Arizona State Department of Transportation, as the freeway will have on-off ramps at Indian Bend Road, on the eastern end of the development.

Water is supplied to the Scottsdale Pavilions by Vestar, by its operation of a groundwater pump on the reservation. Sewage service is also supplied by Vestar, which operates a water treatment facility on the reservation. Electrical service is supplied by the Salt River Project. The Scottsdale Pavilions Owners Association has a contract with the City of Scottsdale to provide fire department services.

The Community also provides governmental services to the Scottsdale Pavilions including zoning, police and fire protection. The Community conducts health inspections and enforces

building safety standards.

It is undisputed that, from the Community's perspective, the Scottsdale Pavilions was developed on the reservation as part of the Community's efforts to achieve economic self-sufficiency.

It is also undisputed that, although the Community is a federal enclave, some state funds are expended for the benefit of the Community.

The State imposes a sales tax on the gross receipts of these enterprises doing business on the reservation at the rate of 5%, pursuant to A.R.S. sections 42-1306 and 42-1317A1. A.R.S. sections 42-1317C &E, and 42-1341C provide that the Arizona State Department of Revenue shall set aside a portion of the sales tax collections and promptly remit that portion to Arizona counties, cities and towns. Under that system, the state remits .5% of sales taxes collected to Arizona cities and .7616% to Arizona counties.

The Community imposes a sales tax on the gross receipts of the businesses at Scottsdale Pavilions at a rate of 1%. Surrounding cities impose similar sales taxes on gross receipts.

The State imposes a rent tax in the amount of 4.5% on the gross rents realized by sublessors of real property which is used by lessees for commercial purposes, pursuant to A.R.S. section 42-1317A5. The State remits .6% of the gross rents realized by the sublessor entities to Arizona cities, and .9139% to Arizona counties.

The defendants filed a Motion for Summary Judgment on all claims. In their motion, the defendants contend that the State is entitled to collect both the sales tax and rent tax.

In their cross-motion, the Community contends that the state taxes are preempted by federal laws. Further, it argues that the portion of the sales tax that the State collects from reservation

businesses to give to its political subdivisions is illegal and discriminatory.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "One of the principal purposes of the summary judgment rules is to isolate and dispose of factually unsupported claims." *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-24 (1986). A motion for summary judgment against a party is appropriate when that party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

ANALYSIS

The issue before the Court is whether Arizona is barred, by federal preemption or otherwise, from taxing transactions between non-Indians on reservation land. In particular, the Court must determine whether the state can impose a sales tax and a rent tax. In determining whether the state taxes are preempted in this case, the Court does not apply the standard preemption analysis, rather, the Court applies a flexible analysis sensitive to the particular facts and federal legislation, with " 'particularized examination of the relevant state, federal, and tribal interests.' " *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) (quoting *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982)).

A. The Sales Tax

In this case, there is no particular federal statute under which the state sales taxes would be preempted. Instead, the Community argues that the state taxes are preempted by the broad

federal and tribal regulatory scheme. The Community contends that the taxes imposed by the state in this case threaten tribal sovereignty and self-determination because the state's taxes hinder the Community's ability to tax and thereby raise needed revenues. The Community contends this is particularly unfair given the fact that the Community provides a wide range of governmental services to the businesses at issue in this case.

The Supreme Court has ruled that when products originating off the reservation are sold on the reservation to non-Indians, both the state and the tribe retain jurisdiction to tax the transaction. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 1784 (1980). The Court reasoned that the two regulatory systems, that of the tribe and the state, could co-exist because the two systems were not in direct conflict. *Id.* at 158.

In making this ruling, the Court explained that the state tax did not "infringe the right of reservation Indians to 'make their own laws and be ruled by them', merely because the result of imposing its taxes [was] to deprive the Tribes of revenues which they currently [were] receiving." *Id.* at 156 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Indeed, the Court noted that the tribes and the state each have an interest in raising revenue to provide essential government services. *Id.* at 156-157. The tribes' interest would be strongest "when the revenues were derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is recipient of the services." *Id.* On the other hand, the Court recognized that the state's interest would be strongest when the tax is "directed at off-reservation value and when the taxpayer is the recipient of state services." *Id.* at 157.

As in the *Colville* case, the products sold by the retailers in this case are products produced off the reservation. *See* 447

U.S. 134. Also, it is undisputed that the vast majority of the consumers purchasing the products, and paying the sales tax, are persons living off the reservation who are recipients of state services. *See Id.* The extent that the consumers/taxpayers receive services of the Community in this case is limited to the services they receive while on the reservation at the retail establishments. Accordingly, the Court finds that the State of Arizona has a strong interest in taxing the transaction, while the Community's interest is less strong. The Court notes that the State's interest in taxing the transaction in this case is even stronger than the state's interest in the *Colville* case. *See Id.* In *Colville*, the businesses selling the products taxed were Indian-owned, while here the businesses are owned by non-Indians. *Id.*

The Community seeks to distinguish this case from *Colville* and the cases that have followed it based on the fact that those cases involved smokeshops and this case involves retailers selling other kinds of products. *Colville*, 447 U.S. 134; *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 800 F.2d 1446 (9th Cir. 1986), *cert. denied*, 481 U.S. 1051 (1987). The Community argues that the state taxes in *Colville* and the cases that followed it were not preempted because the product being sold by the tribes in those cases were cigarettes. *See Id.* This Court disagrees. The courts in those cases were much more interested in who the product was sold to and where the product originated, than they were interested in the type of product being sold. *Id.*

B. The Rent Tax

As for the state rent tax, the parties agree that the same principles of preemption which apply to the state sales tax also apply to the rent tax. The Court agrees, and finds the rent tax also survives an attack based on preemption.

The rent tax is imposed on non-Indian lessees. Also, although the lessees lease property on the reservation, the businesses on the property market the majority of their products to non-Indian customers. Further, the businesses sell products which originate off the reservation. Accordingly, for the reasons stated above, the tax is not preempted.

C. Distribution of Revenues to Cities and Counties

The Community also contends that the taxes in this case are discriminatory and therefore unconstitutional because some of the revenues collected is distributed to the State's cities and counties. The Court finds no merit in this contention, which was expressly rejected by the Ninth Circuit in *Chemehuevi*, 800 F.2d at 1450 (state's failure to include the tribe in its revenue sharing program did not invalidate an otherwise valid tax). In making this ruling, the court noted that the tribe did not stand in relation to the state in the same way that a local municipal government stood. *Id.*

CONCLUSION

In conclusion, the Court finds that the taxes at issue are not preempted or otherwise barred by federal law.

IT IS THEREBY ORDERED that the Defendants' Motion for Summary Judgment is granted (#15). The Clerk of the Court is directed to enter judgment in favor of the Defendants and against the Plaintiff.

IT IS FURTHER ORDERED that the Defendants' Motion to Quash is denied as moot (#22).

IT IS FURTHER ORDERED that the Plaintiff's Motion for Summary Judgment is denied (#20).
DATED this 2nd day of September, 1993

/s/ Stephen M. McNamee,
United States District Judge

Copies to all counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT

Case Number:
CIV 92-0121-PHX-SMM

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
Plaintiff,

v.

THE STATE OF ARIZONA, AND PAUL WADDELL,
Director of the Arizona Department of Revenue,
Defendants.

DECISION BY COURT

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the court having granted defendants' motion for summary judgment in favor of the defendants and against the plaintiff, plaintiff take nothing and the complaint and action are hereby dismissed.

Dated September 3, 1993

Clerk: Richard H. Weare

/s/ B. Walker (by) Deputy Clerk

APPENDIX E

ARIZONA REVISED STATUTES

§ 42-1306. Levy of tax; purposes; distribution

A. There is levied and there shall be collected by the department, for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the municipalities and counties in this state, to reduce or eliminate the annual tax levy on property for state, municipal and county purposes and to reduce the levy on property for public school education, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as prescribed by this article.

B. If any funds remain after the payments are made for state purposes, as provided for by subsection A, the remainder of the funds shall be paid into the state school fund for educational purposes.

C. The tax levied by and collected pursuant to this article is designated the "transaction privilege tax".

§ 42-1310.01. Retail classification; definitions

Text of section effective July 1, 1995

A. The retail classification is comprised of the business of selling tangible personal property at retail. The tax base for the retail classification is the gross proceeds of sales or gross income derived from the business. The tax imposed on the retail classification pursuant to this section does not apply to the gross proceeds of sales or gross income from:

[An extensive list of exemptions, not applicable here, is omitted.]

§ 42-1310.13. Amusement classification; definition

A. The amusement classification is comprised of the business of operating or conducting theaters, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, billiard or pool parlors, bowling alleys, public dances, dance halls, boxing and wrestling matches, skating rinks, tennis courts, except as provided in subsection B of this section, video games, pinball machines, sports events or any other business charging admission or user fees for exhibition, amusement or entertainment. For purposes of this section, admission or user fees include, but are not limited to, any revenues derived from any form of contractual agreement for rights to or use of premium or special seating facilities or arrangements. The amusement classification does not include:

[An extensive list of exemptions, not applicable here, is omitted.]

§ 42-1310.14. Restaurant classification

A. The restaurant classification is comprised of the business of operating restaurants, dining cars, dining rooms, lunchrooms, lunch stands, soda fountains, catering services or similar establishments where articles of food or drink are sold for consumption on or off the premises.

[Subsection B is omitted as unnecessary.]

§ 42-1317. Imposition of tax; rates; distribution base

A. The tax imposed by this article is levied and shall be collected at the rate of:

1. Five per cent of the tax base as computed for the business of every person engaging or continuing in this state in the following business classifications:

. . .

(j) Amusement classification.

(k) Restaurant classification.

. . .

(m)Retail classification.

. . .

C. Forty per cent of the tax revenues collected from persons on account of engaging in business under the business classifications listed in subsection A, paragraph 1, subdivision (j) through (n) of this section is designated as distribution base for purposes of § 42-1341.

§ 42-1341. Remission and distribution of monies

. . .

C. Of the monies designated as distribution base the state treasure shall:

1. Pay twenty-five per cent to the various incorporated municipalities in this state in proportion to their population as shown by the last United States decennial or special census, or revisions to the decennial or special census certified by the United States bureau of the census, to be used by the municipalities for any municipal purpose.

2. Pay 38.08 per cent to the counties in this state by averaging the following proportions:

[Subsubsections (a) and (b) omitted as unnecessary.]

3. Pay an additional 2.43 per cent to the counties in this state as follows:

[Subsubsections (a) and (b) omitted as unnecessary.]

APPENDIX F

CODE OF ORDINANCES
Salt River Pima-Maricopa Indian Community

Sec. 15-51. Definitions.

As used in this article, unless the context indicates otherwise, the following terms shall have the meanings herein ascribed to them:

. . .

Standard Retail Schedule. The tax rate applicable to the gross proceeds of sales at retail of tangible personal property in Scottsdale, Arizona, including taxes imposed by the State of Arizona, Maricopa County, City of Scottsdale and any other taxing authority.

Sec. 15-52. Imposition of tax; tax schedule.

There are hereby levied upon persons on account of their business activities within the Salt River Pima-Maricopa Indian Community and shall be collected by the collector for the purposes of raising revenue to be used in defraying the necessary expenses of the Salt River Pima-Maricopa Indian Community, privilege taxes to the extent hereinafter provided, to be measured by the gross sales or gross income of persons, whether derived from residents of the Salt River Pima-Maricopa Indian Community or not; and all of said gross sales or gross income shall be used to measure the tax in accordance with the following schedule:

(a) **The Standard Retail Schedule**: An amount equal to the standard retail percentage of the gross proceeds of sale

---

[a]Item (a) has changed under Sec. 15.52. Phil said he would add a footnote about it.

or gross income from the business upon every person engaging or continuing with the Salt River Pima-Maricopa Indian Community in the following businesses:

(1) Selling any tangible personal property whatsoever at retail, except gasoline and except for the sale of those items listed in any other subsection hereof. When any person is engaged in the business of selling such tangible personal property at both wholesale and retail, the retail rate shall be applied only to the gross proceeds of the sales made other than at wholesale when his books are kept so as to show separately the gross proceeds of sale of each class; and when books are not so kept, the retail rate shall be applied to the gross proceeds of every sale made.

(2) Operating or conducting theatres, movies, shows of any type or nature, exhibitions, concerts, carnivals, circuses, golf courses, golf driving ranges, fairs, races, contests, horse stables, boxing and wrestling matches and any business charging admission fees for exhibition, amusement or instruction other than projects of bona fide religious or educational institutions.

The tax prescribed under the terms of this subsection (a)(2) shall not apply to events sponsored by the Salt River Pima-Maricopa Indian Community.

. . .

(4) Leasing or renting by the lessee of real property within the community for a consideration the use of occupancy of improvements on such real property, including any rights or interests in such property to the person in actual possession or occupation of the leased premises. The tax prescribed under this subsection (a)(4) shall not apply to the leasing or renting of residential dwelling units, except as provided for in SRO

2-64, as amended, codified as sections 15-91 through 15-99, intended primarily for leasing or renting to persons who reside in such units, facilities or spaces as their permanent or principal places of abode.

Sec. 15-54. Deduction in computing tax.

(b) (1) A taxpayer who has appropriately paid the transaction privilege tax on a transaction to the State of Arizona may deduct from the transaction privilege tax payment to the Salt River Pima-Maricopa Indian Community an amount equal to the transaction privilege taxes paid to the State of Arizona, but that amount shall not exceed the amount that otherwise would be payable to Salt River Pima-Maricopa Indian Community under section 15-52 (a) hereof if the rate was five and one-half (5.5) per cent.

(2)

No. 95-162

Supreme Court, U.S.
FILED
AUG 22 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Petitioner,

v.

STATE OF ARIZONA, and PAUL WADDELL, DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are states preempted from taxing retail sales of non-Indian goods to non-members of an Indian tribe by non-Indian retailers?

2. Is an otherwise valid state tax preempted because the state distributes part of the tax proceeds to its political subdivisions?

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SUPPLEMENTAL STATEMENT OF THE CASE

The Salt River Indian Reservation (Reservation) is located in the Phoenix metropolitan area, and is bordered by the cities of Scottsdale, Tempe and Mesa. The shopping mall at issue here, the Scottsdale Pavilions, was developed by a non-Indian developer. Most of the customers at the mall are non-Indians who reside outside the Reservation. Indeed, Petitioner, the Salt River Pima-Maricopa Indian Community (Community), has admitted that greater than 99% of the gross receipts from sales at the mall are attributable to goods or products brought to the mall from outside the Reservation, and the Community is unaware of any tangible personal property sold at the mall which is made on the Reservation.

Tenants at the mall include large national chains, such as J.C. Penney, Target, Circuit City, Sear's Home Life, Toys-R-Us, United Artist Theaters, McDonald's and Denny's, and many smaller retailers. The mall has been an enormous success, with annual gross receipts exceeding $200 million. Other than its retail location at the mall, none of the non-Indian tenants has any administrative, corporate, marketing, distribution or other activities within the Reservation. All of the non-Indian enterprises are managed by non-members of the Community, and none of the managers are residents of the Reservation.

The Community misstates the record when it asserts that the State does not furnish governmental services to the Reservation. Petition at 5. The court of appeals found that the "developer, the State, and the Community all provide services to the mall." *Salt River Pima-Maricopa Indian Community v. State of Arizona (Salt River)*, 50 F.3d

734, 735 (9th Cir. 1995), included in Petition at App. 1a-11a. The Community also misstates the record when it states it furnishes considerable services to the mall. Petition at 5. The record shows the Community's expenditures related to services at the mall are small compared to the Community's revenue from the mall. The court of appeals found that "to the extent that the Community has expended its resources on ancillary services at the mall, it appears that it has been more than adequately compensated through the 1 percent sales tax." *Salt River,* 50 F.3d at 738; Petition, App. 9a.

The record shows that the State and its political subdivisions maintain roads on the Reservation, including the roads providing access to the mall. Approximately 1000 Reservation children attend school at off-Reservation public schools supported by State and local taxes. The court of appeals also found that it "is undisputed that Arizona and its subordinate entities provide the governmental services used by the non-Indian purchasers off the reservation." *Salt River,* 50 F.3d at 735; Petition, App. 4a. *See Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 189 (1989) ("The relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it.").

The Community filed an action challenging the State's imposition of a tax on the gross receipts of retail, restaurant and amusement businesses at the Scottsdale Pavilions, arguing that the State tax "interferes with the plaintiff's right to impose a just tax because it is impossible for Regulated Reservation Enterprises to pay sales

taxes at a rate higher than sales taxes imposed on comparable businesses located in Scottsdale, Tempe or Mesa which compete in the same market." Complaint, ¶VI. The Community also challenged these taxes because the State distributes a portion of its receipts to counties and cities pursuant to a statutory formula, but does not make similar distributions to Indian tribes.[1]

The district court and court of appeals each rejected the Community's claims, and upheld the imposition of the State tax on the non-Indian businesses.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT STATES ARE NOT PREEMPTED FROM TAXING RETAIL SALES TO NON-MEMBERS OF AN INDIAN TRIBE BY NON-INDIAN RETAILERS.

A. The Balance Of Interests Tips In The State's Favor When The Taxed Transactions Are Between Non-Indians And The Goods And Services Sold Are Non-Indian.

The Community argues that the court of appeals held "categorically" that sales of non-Indian products to non-Indians are taxable by a state. Petition at 6. The court of appeals did not apply such a test. Rather, the court of

[1] The Community also challenged the Arizona tax on rent receipts of the developer from its non-Indian tenants. This claim was rejected by both the district court and the court of appeals, and the Community does not challenge those rulings here.

appeals openly considered and recited the facts relating to the nature of the product transferred, the identity of the parties to the transactions, the governmental services available, and the federal and tribal interests at stake. It concluded:

> Applying these principles to the facts here, it is clear that the balance tips in favor of Arizona's taxation. Most importantly, the goods and services sold are non-Indian, and the legal incidence of Arizona's taxes falls on non-Indians. *See Colville*, 447 U.S. at 151, 100 S.Ct. at 2454 (citing *Moe*, 425 U.S. at 482, 96 S.Ct. at 1645). Furthermore, Arizona and its agents provide the majority of the governmental services used by these taxpayers. Consequently, the State's interest is at its strongest, not its weakest. *Id.*, 447 U.S. at 157, 100 S.Ct. at 2083.

Salt River, 50 F.3d at 737; Petition, App. 8a.

The Community's argument that the court of appeals failed to consider the federal and tribal interests in reservation economic development ignores the court's opinion. Citing this Court's decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the court of appeals noted "that although Congress sought to foster tribal self-government and economic development, it had not gone so far as to preclude state taxation of sales by Indians to nonmembers of the tribe." *Salt River*, 50 F.3d at 737; Petition, App. 7a.

The Community's argument that the reasoning of *Colville* and similar cases only applies when a tribe seeks to market a tax exemption misreads those cases. This Court has recognized that a state tax "which falls on non-

Indian purchasers of goods merely retailed on a reservation – stands on a markedly different footing from a tax imposed directly on Indian traders, on enrolled tribal members or tribal organizations, or on 'value generated on the reservation by activities involving the Tribes.' " *Dept. of Taxation & Finance v. Milhelm Attea*, 114 S.Ct. 2028, 2035 (1994) (quoting *Colville*, 447 U.S. at 156-157).

Colville rejected preserving a tax exemption as a grounds for the preemption of a state tax. A state's authority to tax an on-reservation non-Indian transaction was not, however, premised on the presence of any marketing of a tax exemption. The court of appeals correctly noted that if the Arizona tax is disallowed there is nothing to prevent the Community from later reducing its own tax to attract business, and that *Colville's* reasoning depended on whether the products sold are of Indian origin. *Salt River*, 50 F.3d at 738; Petition, App. 9a.

The Community fails to accept that the primary factors in the balancing of interests in this case have to be that the buyers and sellers are non-Indians, and the goods and services sold are of non-Indian origin. The Reservation is the location of these transactions, but neither the Community nor its members are actively involved in the operations of the taxed businesses. While the court of appeals considered the federal and tribal interests involved, those interests pale against the overwhelmingly non-Indian nature of the taxed activities. The court of appeals correctly applied this Court's precedents, and upheld the Arizona taxes.

B. A State Tax On Non-Indian Transactions Is Not Preempted Because A Tribe Seeks To Tax The Same Transaction.

The Community's only revenue from the mall is from the imposition of its own tax on sales there. Its essential claim is that the Arizona tax interferes with its ability to increase its tax because the total tax burden on transactions at the mall cannot be greater than the burden on off-reservation transactions.

This Court has held that states and tribes may both tax on-reservation transactions, and a state tax is not preempted merely because it prevents a tribe from imposing a higher tax. *Colville*, 447 U.S. at 158; *Cotton Petroleum*, 490 U.S. at 187-8. The Ninth Circuit has similarly held that a state tax is not barred because of the risk of multiple taxation. *Chemehuevi Indian Tribe v. California State Board of Equalization*, 800 F.2d 1446 (9th Cir. 1986), *cert. denied*, 481 U.S. 1051 (1987); *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981); *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981); *Fort Mohave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

The Community's claim ignores clear holdings of this Court that a state and tribe have concurrent taxing authority over non-Indian transactions taking place on a reservation. The Community's complaint that it cannot increase its tax on sales by non-tribal members is insufficient to support the preemption of the Arizona tax.

II. A STATE TAX ON NON-INDIAN TRANSACTIONS IS NOT BARRED BECAUSE THE STATE DISTRIBUTES PART OF ITS REVENUES TO ITS POLITICAL SUBDIVISIONS.

Before the district court, the Community argued that the State's distribution of a part of its tax receipts to its own political subdivisions, but not to Indian tribes, was discriminatory. The district court rejected this, citing the Ninth Circuit's ruling in *Chemehuevi* that tribes do not stand in relation to a state in the same way as a local municipal government. Petition, App. 20a.

In the court of appeals, the Community argued the taxes were preempted by federal law because a portion of the receipts were distributed to political subdivisions. The court of appeals specifically noted in its opinion that the Community had abandoned its claim of discriminatory allocation of tax revenues. *Salt River*, 50 F.3d at 736, n.3; Petition, App. 4a. The court of appeals did not separately address the Community's preemption argument, apparently believing that it was not properly before it because the argument had not been raised below, or that it was subsumed within the general preemption issue. The court did reject the essential point of the Community's argument, however, when it rejected "the Community's claim that it is entitled to a proportionate share of the State's receipts." *Salt River*, 50 F.3d at 737; Petition, App. 8a.

The Community's main complaint appears to be that State tax revenues derived from on-Reservation transactions are distributed to off-Reservation political subdivisions which do not provide services to the Reservation. In

at least two respects this assertion is not supported by the facts. The county (i) maintains roads on the Reservation and (ii) provides funds to the school district which includes the Reservation. In any event, the Community's argument is not that the State lacks authority to impose the tax, but that it loses that authority because of how it chooses to spend the money. Because the Community asserts that all of the State's collections from the Reservation are spent off-Reservation, this argument concerning distributions to political subdivisions is actually no different than the general preemption argument. For the reasons set out in its opinion, the court of appeals was correct to reject it.

The Community's argument fails for another reason. The taxed transactions involve non-Indians who live outside the Reservation, within cities and counties which receive funds from the State. Tax revenues distributed to the cities and counties are used to provide services to the very persons who pay the tax. While the taxed transactions may take place on the Reservation, the majority of governmental services used by those taxpayers are provided by the State and its political subdivisions. There is no federal bar to a state distributing its tax revenues in this manner.

III. THIS CASE HAS NO ISSUE CONCERNING THE SCOPE OF THE INDIAN COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Community argues in its Petition that the court of appeals' "opinion does not mention the petitioner's Indian Commerce challenge to the State's taxation of

reservation activities for the exclusive benefit of its cities and towns." Petition at 5. The Court need not address this issue, however, because the Community did not raise the issue with the court of appeals. The Community never cited to the Indian Commerce Clause, U.S. Constitution, Article 1, § 8, cl. 3, in its briefs before the court of appeals. Therefore, it is not properly before this Court.

In any event, the Community's assertion is not accurate. In rejecting the Community's claim that it is entitled to a proportionate share of the State's receipts, the court of appeals cited its earlier ruling in *Chemehuevi*, 800 F.2d at 1450, which it parenthetically described as "stating that 'the failure of the state to include the Tribe in its revenue sharing program does not invalidate the state tax' under the Indian Commerce Clause." *Salt River*, 50 F.3d at 738; Petition, App. 8a. This understanding of the limited applicability of the Indian Commerce Clause is consistent with this Court's holding in *Colville* that the Clause has a "limited role to play in preventing undue discrimination against, or burdens on, Indian commerce." 447 U.S. at 157. The Arizona taxes are applied in a nondiscriminatory manner to all transactions within the State. There is no violation of the Indian Commerce Clause.

IV. THIS CASE PRESENTS NO SPECIAL REASON FOR DISCRETIONARY REVIEW.

The Community's Petition presents no special reason for this Court to exercise its discretion by granting review. None of the reasons this Court has included in its rules as justifying review are present here. *See* Supreme Court Rule 10.1. The court of appeals' decision follows

the precedents of this Court, and is not in conflict with the decisions of other circuits or any state court of last resort. There is no special and important reason for this Court to review the considered opinion of the Ninth Circuit.

CONCLUSION

Federal preemption does not prevent a state from taxing retail sales to non-members of an Indian tribe by non-Indian retailers doing business at a non-Indian owned and operated shopping center located on an Indian reservation, nor does it bar a state tax because the state distributes part of the tax proceeds to its political subdivisions. The petition for writ of certiorari should be denied.

Respectfully submitted,

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